

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CARLO DEMARTINO	:	
for Revision of a Determination or for Refund of	:	ORDER
Personal Income Tax under Article 22 of the Tax	:	DTA NO. 820045
Law and the New York City Administrative Code	:	
for the Period April 30, 2000 through September	:	
30, 2002.	:	

Petitioner, Carlo DeMartino, 153-14 82nd Street, Howard Beach, New York 11414-1739, filed a petition for revision of a determination or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the period April 30, 2000 through September 30, 2002.

The Division of Tax Appeals issued an Order of Discontinuance dated November 24, 2004 in this matter, canceling seven deficiencies asserted due from Carlo DeMartino by notices of deficiency L-021913345 through L-021913351.

On December 23, 2004, petitioner filed an application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. By a letter dated December 27, 2004 of Assistant Chief Administrative Law Judge Daniel J. Ranalli, a copy of the application for costs was transmitted to the Division of Taxation (“Division”) since no copy was provided to it by petitioner, and the Division was given the opportunity to file a response¹ by January 26, 2005, which date began the 90-day period for the issuance of this order.

¹ No response was submitted by the Division of Taxation.

Based upon petitioner's application for costs and attached documentation, and all pleadings and documents submitted in connection with this matter, Frank W. Barrie, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. On February 9, 2004, a conciliation conference was conducted at petitioner's request at which he appeared by Lawrence R. Cole, CPA. After giving due consideration to the evidence presented, the conciliation conferee denied the request for redetermination or revision of the seven notices of deficiency, which are also at issue in this matter. By a conciliation order dated March 19, 2004, the seven notices of deficiency were sustained.

2. Petitioner filed a petition which was received on June 18, 2004 seeking a revision of a determination of tax due in the amount of \$8,016.75 and noted the following basis for his petition: "The business went under." His petition referenced the seven notices of deficiency which were the subject of the conciliation conference described above. He also noted in this petition that "I am gathering additional information to present my case."

3. By a letter dated June 24, 2004, the Division of Tax Appeals returned the petition described above because it was "deemed to be not in proper form" for the following reason:

We need a better explanation of what you are disagreeing with. Specifically, you must list the alleged errors of the Division of Taxation, and the facts which you intend to prove at the hearing to establish these errors and provide a basis for the relief sought.

4. Petitioner then refiled his petition which was received on August 5, 2004 by the Division of Tax Appeals. Petitioner added a couple of sentences which explained in an

incoherent fashion that he apparently needed more time to make payment on his withholding tax liability:

As of June 2003 I am trying to put together a package on L and 1/4's so we could come together with is owe and whit is not. Please give me add time get what ever I need [sic].

He also included in his refiled petition a Consolidated Statement of Tax Liabilities dated June 28, 2004 which summarized petitioner's withholding tax liabilities with New York State as follows:

Assessment ID	Tax Period Ended	Penalty amount	Interest Amount	Payments/ Credits	Current Balance Due
L-021913351	12/31/99	\$1,110.02	\$12.04	\$603.00	\$ 519.06
L-021913347	06/30/00	699.74	13.10	-0-	712.84
L-021913350	03/31/01	905.80	16.95	-0-	922.75
L-021913349	06/30/01	765.96	14.34	-0-	780.30
L-021913348	09/30/01	1,675.29	31.36	-0-	1,706.65
L-021913346	12/31/01	2,489.37	46.60	-0-	2,535.97
L-021913345	09/30/02	370.57	6.94	-0-	377.51
Totals		\$8,016.75 ²	141.33	\$603.00	\$7,555.08

5. By a letter dated August 11, 2004, the Division of Tax Appeals acknowledged receipt of the petition and advised petitioner that "it has been forwarded to the Office of Counsel for preparation of the answer" which was due on or before October 25, 2004.

6. By a letter dated November 1, 2004 to the Division's Director of Litigation, the Chief Administrative Law Judge of the Division of Tax Appeals advised that "no answer has been filed by the Office of Counsel" in this matter, and "unless the Office of Counsel can demonstrate that

² This amount corresponds with the amount challenged in the original petition filed by Mr. DeMartino.

it has filed a timely answer, all material allegations of fact set forth in the petition are deemed admitted and this matter will now be scheduled for hearing.”

7. By a letter dated November 3, 2004, the Office of Counsel transmitted to the Division of Tax Appeals a Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding executed by Andrew W. Haber, Senior Attorney.

8. By an Order of Discontinuance dated November 24, 2004, the seven notices of deficiency were canceled by the Division of Tax Appeals.

9. By a letter dated December 23, 2004, petitioner seeks reimbursement of “fees I spent to defend myself” and attached an invoice on the letterhead of Lawrence R. Cole & Associates, Inc., showing a balance due of \$2,300.00, after a retainer received of \$1,000.00 was applied to a bill of \$3,300.00 for 22 hours @ \$150.00/hour. The professional services provided by the accountant were described as follows:

For professional services rendered re: DTA #820045; to review assessments and correspondence concerning New York State taxes personally assessed against the officer of Executive Autobody, Inc. resulting from corporate assessments for the years 2000 through 2002. Prepared personal petitions for conciliation conference and met with client to discuss [sic] client position and conciliation conference issues and objectives. Attended conciliation conference with client; reviewed Conciliation consent forms received and advised client not to sign consent forms; review Conciliation orders and discussed alternatives and what future rights and actions he should consider; helped taxpayer file Tax Appeals Petition; advised on revisions.

CONCLUSIONS OF LAW

A. Tax Law § 3030(a) provides, generally, as follows:

In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, *the prevailing party* may be awarded a judgment or settlement for:

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and

(2) reasonable litigation costs incurred in connection with such court proceeding. (Emphasis added.)

B. Petitioner maintained administrative proceedings against the commissioner, first by requesting a conciliation conference where his request was denied and the notices of deficiency for unpaid withholding taxes were *sustained* by the conferee. Consequently, petitioner clearly was not “the prevailing party” during such administrative proceeding. He then commenced a proceeding in the Division of Tax Appeals by the filing of an inadequate petition which merely alleged that “his business went under.” After this petition was returned to him, he refiled his petition on August 5, 2004 making allegations against the commissioner which are difficult to comprehend given the incoherency as described in Finding of Fact “4.” Moreover, once again, rather than asserting specific errors on the part of the commissioner as requested by the letter from the Division of Tax Appeals dated June 24, 2004, by his refiled petition, petitioner merely sought additional time to work out a payment plan for the payment of the unpaid withholding taxes. With his refiled petition, he also attached the Consolidated Statement of Tax Liabilities dated June 28, 2004 as noted in Finding of Fact “4.”

C. As indicated in the Findings of Fact, the Division did not file an answer to the petition as refiled. When questioned as to such failure by the letter dated November 1, 2004 of the Chief Administrative Law Judge, the response by the Office of Counsel was to cancel the deficiencies asserted against petitioner. In addition, the failure by the Office of Counsel to supply a response to petitioner’s motion for costs is similarly inexplicable. In any event, in the first instance, the cancellation of deficiencies by the Office of Counsel supports a conclusion that petitioner was “the prevailing party.”

D. However, the analysis of petitioner’s right to obtain administrative costs against the commissioner does not end here since under Tax Law § 3030(c)(5)(B)(i), a “party shall not be

treated as the prevailing party . . . if the commissioner establishes that the position of the commissioner in the proceeding was substantially justified.”

E. By failing to file a response to the petitioner’s application for costs, it would seem that the commissioner has failed to establish that his position in this proceeding was substantially justified. However, it may not be so concluded, because petitioner has established by his very own petition that the commissioner’s position in this proceeding was substantially justified. Petitioner has never denied the tax liability at issue. Rather, he simply sought by the filing of his petition to obtain additional time to make payment. Consequently, he may not be treated as the prevailing party since *at the time the notices of deficiency were issued*, the Division’s position was substantially justified (Tax Law § 3030[c][8][B]; *see, Heasley v. Commissioner*, 967 F2d 116, 120, 92 US Tax Cas ¶ 50,412).

F. Furthermore, petitioner’s proof of “reasonable administrative costs incurred” is inadequate. As relevant herein, reasonable administrative costs include reasonable fees *paid* in connection with the administrative proceeding (*see*, Tax Law § 3030[c][2][B]). Petitioner’s proof that he *paid* administrative costs consisted merely of an invoice from an accountant which does not show payment of the invoice (although it does indicate the payment of a retainer of \$1,000.00). In addition, petitioner has not offered any proof concerning his net worth as required by Tax Law § 3030(b)(5)(A)(ii).

G. Petitioner’s application for costs and fees is hereby denied.

DATED: Troy, New York
March 3, 2005

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE